



January 31, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Notification; CC Docket Nos. 99-68 and 01-92

Dear Ms. Dortch:

On January 28, 2005, James Falvey of Xspedius Communications, LLC, James Mertz of KMC Telecom, Inc., and I conducted three separate *ex parte* meetings regarding the above-referenced proceedings with the following individuals: (1) Scott Bergman, Legal Advisor to Commissioner Adelstein; (2) Jessica Rosenworcel, Legal Advisor to Commissioner Copps; and (3) Austin Schlick, Linda Kinney, Jeffrey Dygert, and Christopher Killion of the Office of General Counsel. During each of the meetings, we urged the Commission to unify intercarrier compensation regimes without delay. In so doing, the Commission should act in a comprehensive manner, rather than on a piecemeal basis as some have suggested.

As recently as October 18, 2004 the Commission stated the need for comprehensive, rather than *ad hoc*, reform of the patchwork of various intercarrier compensation regimes that presently exist. In discussing the need for "comprehensive reform," the Commission stated that "the benefit of considering these important [intercarrier compensation] issues outweighs the consequences" of not addressing individual outstanding issues. *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179, n.49 (rel. Oct. 18, 2004) ("Oct. 18 Order"). As a result, the Commission chose "not to address pending petitions for reconsideration, clarification, or waiver of the *ISP Remand Order* at [that] time." *Id.*

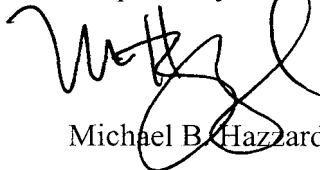
In that order, the Commission further stated that "similar rates should apply to both local voice and ISP-bound traffic" because no cost difference ever has been established. Oct. 18 Order at ¶ 24. This statement of fact was not surprising. In the *ISP Remand Order*, the Commission concluded that "there is no reason ... to distinguish between voice and ISP traffic with respect to intercarrier compensation." *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 93 (2001), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003) ("*ISP Remand Order*"). Indeed, the Commission expressly found "no reason to impose different rates for ISP-bound and voice traffic" because the record failed to demonstrate "any inherent differences between the costs on any one network of delivering a voice call to a local end user and a data call to the ISP." *Id.* at 90.

In spite of the plain fact that the Commission has: (1) stated an intention to act comprehensively to reform intercarrier compensation and (2) reiterated that there is no cost difference in terminating ISP-bound or any other type of traffic, it appears that the Commission may be poised to take action that further could limit the ability of carriers to recover intercarrier compensation for ISP-bound traffic and other types of traffic. Although it would not be unreasonable for the Commission to reaffirm aspects of the existing regime, including that VNXX traffic always has been subject to reciprocal compensation for voice traffic and that the *ISP Remand Order*, to the extent it is still effective, has always applied to all ISP-bound traffic, any substantive rule change would be unreasonable. For example, the Commission apparently is considering an affirmative rule change that could affect transport costs for traffic exchange, which is part and parcel of intercarrier compensation. *See, e.g.*, 47 C.F.R. 51.701(a) (“The provisions of this subpart apply to reciprocal compensation for **transport** and termination of telecommunications traffic”) (emphasis added). Any new “transport” rule would directly contradict the Commission’s statement in the Oct. 18 Order that it needs to act in a comprehensive manner to address intercarrier compensation issues. Moreover, it is unclear whether the transport rule change apparently under consideration was adequately noticed.

KMC and Xspedius also explained that any new, *ad hoc* intercarrier compensation rules would be difficult if not impossible to justify to the D.C. Circuit, given the long-pending *WorldCom* remand. As the Commission no doubt is aware, on October 22, 2004, in No. 04-1179, the D.C. Circuit “directed” the FCC “to advise the court within 90 days ..., and every 90 days thereafter, of its progress in responding to the remand in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). As a result, the FCC is slated to report back to the D.C. Circuit on its progress on or before February 21, 2005. A report back to the D.C. Circuit by the Commission that it adopted any new, *ad hoc* rules without first addressing the *WorldCom* remand at a minimum would severely undercut the Commission’s public position that it needs to act in a comprehensive manner to reform intercarrier compensation due to the complexities of unifying the various existing regimes.

This letter is being filed electronically in each of the above-referenced proceedings. If you have any questions or need additional information, please contact me.

Respectfully submitted,



Michael B. Hazzard

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Communications, LLC*

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